83-918

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

DALE M. CARTER,

Appellant,

vs.

STATE OF ILLINOIS,

Appellee.

On Appeal From The Illinois Supreme Court

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether, on their faces, the criminal provisions of the Illinois Franchise Disclosure Act violate Fourteenth Amendment equal protection and due process because:

(1) Section 12 of the Act delegates to the prosecutor an unmitigated power to grant total *in futuro* exemption from the Act's criminal provisions to any person he chooses "in the public interest," thus enabling him to amend or repeal the statute at will.

(2) Section 32 of the Act authorizes the prosecutor to keep his "public interest" exemptions secret if he says he is acting "in the public interest."

(3) Count Three of the indictment and Section 6 of the Act ("fraud and deceit") are void for vagueness as a consequence of the Act's provision that "fraud" and "deceit" are "not limited to common law fraud or deceit," and for other reasons.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court is reprinted in Appendix A. It is reported at 97 Ill.2d 133, 454 N.E.2d 189 (1982).

The opinion of the Illinois Appellate Court for the First District is reprinted in Appendix B. It is reported at 102 Ill.App.3d 796, 430 N.E.2d 31 (1981).

JURISDICTION

This is an appeal from a judgment of the Supreme Court of Illinois affirming a felony conviction for viola-

tion of the Illinois Franchise Disclosure Act. The Illinois judgment was entered on December 17, 1982, rehearing denied, September 30, 1983. Notice of Appeal was filed in the Supreme Court of Illinois on October 11, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment 14, Section 1, Clauses 2 and 3:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the Illinois Franchise Disclosure Act (the "Act"), Ill.Rev.Stat. ch. 121-½, ¶701, *et seq.* (1981) are set forth in Appendix E. We here present excerpts, adding italics for clarity:

> §3. *Definitions.* • • • (11) "Fraud" and "deceit" are not limited to common law fraud or deceit. • • • • (20) "Administrator" means the Illinois Attorney General.
>
> • • • •
>
> §4. *Prohibited practices.* (1) It is unlawful for any franchise to be . . . sold . . . by any person who is subject to this Act and is not first registered pursuant to Section 16.1 *unless exempt from registration.*
>
> • • • •
>
> §6. *Fraudulent practices.* (1) It is unlawful for any person, in connection with the offer or sale of any franchise, to directly or indirectly: • • • • (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.
>
> • • • •

§12. *Exemptions* . . . . The Administrator may by rule or order . . . *exempt any . . . franchisor . . . from Sections* 4, 16, *or* 16.2 *of this Act if he finds that the enforcement of this Act is not necessary in the public interest* . . . .

• • • •

§16. *Filing requirements* . . . . No franchisor . . . may sell . . . franchises . . . unless such person shall file with the Administrator . . . disclosure statements . . . .

§16.1 *Registration* . . . . The franchisor . . . shall register each salesperson . . . by filing an application containing the information required by Section 16 . . . .

§16.2. *Period of effectiveness* . . . . The registration . . . and the disclosure statement . . . shall be effective for a period of one year . . . .

• • • •

§20. *Criminal prosecution.* Any person who willfully sells a franchise in this state without complying with Sections 4, . . . 16 or 16.1 of this Act . . . commits a . . . felony . . . . The Administrator . . . shall commence and try all prosecutions under this Act . . . .

• • • •

§32. *Public Inspection.* (a) • • • • All disclosure statements and other papers . . . shall be open to public inspection, *except* that the Administrator may, in his discretion, withhhold from public inspection any information the disclosure of which is, in the judgment of the Administrator, *not necessary in the public interest* . . . .

STATEMENT OF THE CASE

The Court below accurately states the facts. App. A. Essentially, appellant was convicted and sentenced to three years imprisonment for the felony of selling an unregistered franchise and defrauding the purchaser in violation of the Illinois Franchise Disclosure Act.

Appellant asserts the facial unconstitutionality of the Act's Section 12 (exemptions "in the public interest") which expressly controls the felony-defining Sections 4, 16, and 16.2 on which his convictions were based.* The relationships among these sections were carefully defined by the Appellate Court (App. B) and accepted by the Illinois Supreme Court.

The Illinois Supreme Court majority specifically decided the Fourteenth Amendment issue on its merits against appellant. Justice Simon, dissenting, voted to reverse the conviction on that same ground. Appellant had raised these issues at pages 11-20 and 23-24 of his Illinois Supreme Court brief.

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* Appellant was convicted on four counts, three of which directly involve Section 12: Count One (§§4, 16), Count Two (§4), Count Four (§§16.1, 16.2).

Appellant was also convicted under the fraud section of the Act (see p. 10, below) which is not controlled by Section 12. However, since the verdict was general (R. 506, 507, 510) the invalidity of the other three counts requires a new trial. See, *e.g.*, *Sandstrom* v. *Montana*, 442 U.S. 510, 526 (1979); *Eaton* v. *City of Tulsa*, 415 U.S. 697, 699 n. (1974). That is why the Illinois Supreme Court addressed the merits of our constitutional claim.

The Illinois Appellate Court recognized appellant's federal claim, App. B, but elected to sustain that claim on the basis of the separation of powers provision of the Illinois Constitution. Appellant had raised the federal issues at pages 23-30 of his Appellate Court brief and 3-7 of his reply brief.

In the trial court, the federal issues were raised in the Supplement to Defendant's Motion in Arrest of Judgment, R. 874-78, which was denied.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The ten Appellate Court and Supreme Court judges in this case have divided evenly on the merits of appellant's claims.

Mr. Justice Simon, dissenting below, summarized the issue:

> "The majority upholds section 12 of the . . . Act . . . which grants the Illinois Attorney General the power to exempt individuals from criminal penalties provided in the Act. The Attorney General's power to grant exemptions is limited only by the highly indefinite requirement that the exemption be 'in the public interest.'
>
> This precedent could undermine civil liberties in a time of crisis. The legislation grants the Attorney General the power to create a privileged class that is exempt from the criminal law which the rest of society must obey. At the same time the legislation fails to establish articulable standards for the Attorney General to use in making such a momentous decision."

Almost thirty years ago, Justice Black warned us:

> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. . . .
>
> A congressional delegation of such vast power to the prosecuting department would raise serious constitutional questions. . . ."
>
> *Berra* v. *United States,* 351 U.S. 131, 139-40 (1956) (dissenting opinion).

This Court, echoing Chief Justice Marshall in *United States* v. *Wiltberger,* 18 U.S. (5 Wheat.) 76, 95 (1820), has put the question in terms of the federal distribution of powers while remaining silent on the intimately related Fourteenth Amendment issue:

> "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions."
>
> *United States* v. *Evans,* 333 U.S. 483, 486 (1948).

This is the first time the Fourteenth Amendment question has been raised in this Court.

The Illinois system of prospective criminal exemptions, controlled by nothing more than the prosecutor's say-so as to "the public interest" is a flat violation of equal protection and due process. It violates those clauses for reasons which are tied to the difference between the traditional post-crime exercise of prosecutorial discretion, and the Illinois system of *in futuro* criminal exemptions.

Even the traditional discretion carries its dangers. Thurman Arnold said it:

> "The idea that a prosecuting attorney should be permitted to use his discretion concerning the laws which he will enforce and those which he will disregard appears to the ordinary citizen to border on anarchy."
>
> Arnold, *Law Enforcement—An Attempt at Social Dissection,* 42 Yale L.J. 1, 7 (1932).

But here we deal with a power more dangerous by far: Illinois has transformed the traditional discretion into an unprecedented and ominous power in the prosecutor to *repeal the statute* as to favored individuals or groups.

The stake is personal liberty. The equal protection standard is therefore "strict scrutiny." See the cases collected in *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 n. 3 (1976).

Kenneth Culp Davis defined the danger which requires the standard:

> "A fundamental fact about the discretionary power to be lenient is extremely simple and entirely clear and yet is usually overlooked: The discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate."
>
> Davis, *Discretionary Justice* 170 (1969).

Like Judge Arnold, Professor Davis is merely identifying a danger which flows from the traditional discretion of the prosecutor. But here the dangers are multiplied exponentially by the delegation of power to confer *prospective* exemption from the criminal law and thus a power to amend the statute. That is why the law of England has forbidden the King to do it since the 17th Century.

The 17th Century barristers knew that the King's *in futuro* dispensation of a statute was actually a power to amend it, and they said so explicitly, see 6 Holdsworth, *History of English Law,* 216-25, 240-41 (1924). *See, e.g., Case of the Seven Bishops,* 12 State Tr. 183, 367 (1688). Justice Powell charged the jury in that case:

> "[This] amounts to an abrogation and utter repeal of all the laws. . . . If this be once allowed of, there will need no Parliament; all the legislature will

> be in the king, which is a thing worth considering, and I leave the issue to God and your conscience."
> 12 State Tr. at 427.

The arbitrary power here conferred upon the Illinois Attorney General *on its face* violates equal protection and due process, see *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373 (1886), because, *id.* at 368:

> "[I]t divides the owners . . . into two classes, not having respect to their personal character and qualifications . . . but merely by an aribtrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure."

The 20th Century reports of this Court are full of equal protection cases involving arbitrary classifications based on *something*: race, religion, sex, or whatever. But the delegation of criminal law-making power to a prosecutor based on nothing more than a patriotic cliche, "the public interest," sets some kind of 20th Century record.

Illinois has specifically held that this egregious statute is good under the Fourteenth Amendment.* That

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* Having based its decision on the Fourteenth Amendment, the Illinois Court remarks that the prosecutor will likely be fair in exempting his favorites because his rules "provid[ing] the procedure" and his "final administrative decisions" are reviewable under the Illinois Administrative Review Act. (App. A) But that prophesy is totally irrelevant to the federal issue because:

1. The issue is the constitutionality of the statute *on its face,* not the Attorney General's rules or conduct

decision not only sanctifies the statute, it debases the Amendment. It needs correction, lest the detested principles of the *Yick Wo* legislators, not to mention the Stuart kings, return to plague us.

II.

Appellant was convicted under Count Three of the indictment of violating the fraud section (Section 6) of the Act. Justice Moran, dissenting below, held that Section 6 was unconstitutional because its key terms, "fraud and deceit," were too vague, because the Act says they are "not limited to common law fraud or deceit." Act, §3(20).

• (Continued)

under it. Reviews of his fairness in wielding an unconstitutional power are beside the point.

2. In any event, the Attorney General is empowered to change or repeal his rules on relatively short notice, Ill.Rev.Stat. ch. 127, ¶¶1005.01, .02 (1981). That makes the "protection" of his rules an illusion.

3. In any event, the rules (App. F, Rule 206) don't protect anything; they are purely procedural; they have nothing to do with the substantive "public interest" standard.

4. In any event, the secrecy provision of Section 32 invites the Attorney General to suppress the relevant information, his lucky beneficiaries will not challenge him in the courts, and the rules contain no provision for notifying anybody else, with or without a secrecy order. There has never been a criminal exemption review and there is never going to be one. Judicial review is a mirage.

For these reasons, Section 6 is unconstitutionally vague and Count Three is void.

Respectfully submitted,

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